

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEON LEONARD MIZRAHI,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF
ANSWERING APPELLEE'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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LOCAL BOARD MEMORANDUM NO. 72
IS APPLICABLE TO THIS CASE.

The government still fails to answer the point raised in appellant's opening (pp 20-21, fn. 6) and closing briefs (pp. 3-4), that is, conscientious objection to war is a circumstance beyond the registrant's control.

Ehlert v. United States, No. 21, 930, 9th Cir.,
decided September 11, 1968 [rehearing en banc
pending].

Under that view, the question of when appellant's conscientious objection claim was filed becomes of less

1 significance.

2 Rather, appellee confines its reply to the proposition
3 that Local Board Memorandum (LBM) No. 72 is inapplicable here
4 because directed only to those four regulations cited in the
5 upper right hand corner thereof, all of which establish "dead-
6 lines" or time periods within which the registrant must act.

7 (A copy of said LBM is appended hereto as Exhibit A, and by
8 this reference is incorporated herein and made a part hereof.

9 Appellee cites no regulation, LBM or other authority
10 to support that position. Appellant submits that the more
11 logical interpretation is one which, in the absence of a regula-
12 tion or directive to the contrary, would permit application of
13 the LBM to those situations which its language may reasonably
14 be construed to reach.

15 Appellee's contention to the contrary notwithstanding,
16 the issue here is not whether LBM No. 72 modifies or affects
17 SSR §1625.2. LBM No. 72 simply provides a rule for determining
18 when a claim is filed. Since, thereunder, appellant's claim
19 was filed the day before the mailing of his induction notice,
20 the Board was not required to find a change of circumstance
21 beyond his control as a prerequisite to reopening. In no way
22 did this result modify or change the content, intent or meaning
23 of SSR §1625.2. Hence, the authorities cited at page 3 of
24 appellee's brief are superfluous, if not irrelevant. (Indeed,
25 the Sterrett case, which reverses the convictions of two regis-
26 trants for failure of the Board to follow applicable regulations,

1 does not even involve Selective Service instructions or memoranda).

2 Furthermore, whatever may have been the legal effect
3 of LBMs in 1954, when Sterrett was decided, or in the preceding
4 years when even earlier decisions cited by appellee were rendered,
5 it is clear from SSR §1606.51, and related sections, that LBMs
6 now have the force and effect of law where not in conflict with
7 the regulations.

8 cf. Levy v. Dillon, D.C. Kan. 1968, 286 F. Supp.

9 593, 596.

10 If, as appellee seems to agree (Reply Brief, p. 3)
11 the purpose of LBMs is to clarify the regulations, that objective
12 is not served unless the Local Boards are uniformly bound to
13 follow them.

14 Appellant has not found any other regulation, bulletin
15 or LBM providing that the date of actual receipt of a registrant's
16 communication, rather than its mailing date, controls the filing
17 date thereof. LBM No. 72 appears to be the only Selective Service
18 authority treating that subject.

19 The National Director was under no duty to select the
20 mailing date as the filing date. That he did so suggests that,
21 in cases where the filing date is critical, LBM No. 72 was in-
22 tended to help the registrant, or at least overt harsh conse-
23 quences where the registrant has acted within the time prescribed
24 by the regulations.

25 It requires no strain to read LBM No. 72 as embracing
26 the instant case. Under SSR §1625.2, appellant was required to



1 submit his claim before the mailing of his induction notice in
2 order to obviate the necessity of the Board finding a change of
3 circumstance.

4 SSR §1625.1(b) states that a registrant --

5 "....shall, within 10 days after it occurs,
6 report to the Local Board in writing any
7 fact that might result in the registrant
8 being placed in a different classification...."

9 Since an application to reopen must thus present new
10 facts within a specific time period, it is apparent that appel-
11 lant's claim to be a conscientious objector falls within the
12 ambit of LBM No. 72, even under appellee's version of its
13 applicability.

14 The government's contention that appellant's claim is
15 devoid of facts indicating a change of status within the preced-
16 ing ten days presumes that such a showing is required. Appellant
17 knows of no authority for such a requirement, and appellee cites
18 none.

19 As appellant pointed out in his reply brief, pp. 9 and
20 10, the ten day period begins to run as of the date that his
21 religious training and beliefs have crystalized into a conscien-
22 tious opposition to all war. Only then is he eligible for I-O
23 classification.

24 This court once observed that --

25 "....there can be no stronger proof of the
26 sincerity of the registrant's objections than

1 his willingness to subject himself to a
2 possible five year penitentiary sentence for
3 draft evasion rather than to submit to com-
4 pulsory service after his claim of exempt
5 status has been rejected."

6 Woo v. United States, 9th Cir., 1965, 350 F.2d
7 992, 995.

8 To reach that plateau of religious conviction requires,
9 for some, at least, an unavoidable confrontation with what
10 becomes for the registrant unconscionable alternatives. It is
11 at that moment of decision that a registrant may be said to have
12 become eligible for classification as a conscientious objector.

13 That moment arrived for appellant when his I-A
14 classification was affirmed on appeal (R. 32/21-33/4).

15 In any event, appellant had a right to have the Local
16 Board, rather than the Courts, consider when his claim had
17 matured, as well as to determine the sincerity and substance
18 thereof.

19 See: Boswell v. United States, 9th Cir., 1968,
20 390 F.2d 181, 183.

21 The Board did not make this determination here,
22 apparently because neglecting to treat appellant's claim as
23 timely filed as required by LBM No. 72.

24 For these reasons, as well as the others discussed in
25 appellant's briefs, appellant's conviction should be reversed
26 and a judgment of acquittal ordered so that the Local Board may

1 be afforded the opportunity to follow the regulations and
2 policies applicable to this case.
3

4 Respectfully submitted,

5 David Finkel
6 David Finkel
7 Attorney for Appellant

8 Hugh R. Manes
9 Hugh R. Manes
10 Of Counsel

11
12 C E R T I F I C A T E

13 I CERTIFY that, in connection with the preparation of
14 this brief, I have examined Rules 18 and 19 of the United States
15 Court of Appeals for the 9th Circuit, and that in my opinion,
16 the foregoing brief is in full compliance with those rules.

17 David Finkel
18 David B. Finkel
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LOCAL BOARD MEMORANDUM NO. 72

ISSUED: DECEMBER 17, 1962

SUBJECT: TIMELY FILING OR SUBMISSION OF NOTICES
OR INFORMATION

Director.

SSS Reg.

1624.1

1626.2

1627.3

1641.6

1. Selective Service Regulations provide that a registrant and other specified persons, to be entitled to a procedural right or to qualify for a status, must file with or submit to the local board a notice or information within a specified period of time or before a "cut-off" date.

2. When such a notice or information is filed with or submitted to the local board by mail, the date of mailing as shown by the postmark on the envelope and not the date it was received by the local board shall be used in determining whether the filing or submission is timely.

3. The envelope in which any such notice or information is received shall be placed in the registrant's cover sheet attached to the contents of the envelope.

(TM 112)

Lewis B. Hrushey.

